United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original with Affidavit of Mailing

74-2555

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To be argued by
ETHAN LEVIN-EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2555

UNITED STATES OF AMERICA,
Appellee,

—against—

RICHARD C. PHILLIPS,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Appellant Richard C. Phillips appeals from a judgment of violation of probation imposed in the United States District Court for the Eastern District of New York (Rayfiel, *J.*) which judgment was entered on May 16, 1974, after a hearing. The violation of probation consisted of appellant's failure to abide by four of the conditions of probation ordered by Judge Rayfiel on October 1, 1971. Appellant's conviction had arisen from his plea of guilty to a one count information charging him, as a licensed dealer in firearms, with knowingly failing to make appropriate entries as to material facts regarding the receipt, sale, and disposition of firearms and failing to maintain records as required by law, in violation of Title 18, United States Code, § 923, and the regulations promulgated thereunder.

On October 1, 1971, appellant was sentenced to the custody of the Attorney General for a term of three years,

three months of which was to be served, with the remaining two and three-quarter years suspended. He was placed on probation for the suspended portion of the sentence, with a "[s]pecial condition of probation . . . that [he] continue to receive psychiatric treatment and that he refrain from any contact with guns". Appellant is incarcerated pending this appeal. He is scheduled for release on parole on March 5, 1975.

On this appeal, the sole issue is whether or not the District Court acted within the proper limits of its discretion in finding appellant to be in violation of his probation.

Statement of Facts

(1)

On October 1, 1971 Richard C. Phillips was sentenced to serve three years pursuant to Title 18, United States Code, Section 3651. Judge Leo F. Rayfiel ordered that appellant be required to serve only three months of that sentence and suspended the remainder (T. 4).* Appellant was placed on probation for the remaining thirty-three months, subject to the standard conditions of probation as set forth in the standing order of the United States District Court for the Eastern District, of New York, dated October 13, 1964 and, in addition, subject to the special condition that he ". . . continue to receive psychiatric treatment and that he refrain from any contact with guns" (T. 10, 15, 19).

On March 11, 1974, appellant was formally charged by the Department of Probation, Eastern District of New York, with violating conditions one, five and seven of the standing order of probation and the special condition of probation

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* Page numbers in parenthesis refer to the transcript of the probation violation hearing on May 16, 1974.

in that he (1) violated local law; (2) failed to notify his probation officer of his change in residence; (3) failed to report as directed; and (4) failed to refrain from having "contact with guns."

(2)

At the hearing on the alleged violation of probation, Police Officer Anthony Esposito testified to the following facts:

On April 24, 1974 appellant was arrested by Police Officer Esposito after he had been involved in a high speed automobile chase and accident (T. 30-31). After appellant was captured he was handcuffed and returned to the policeman's vehicle to be secured. The officer then searched appellant's vehicle and found a briefcase bearing appellant's name and containing a weapons holster, a disassembled weapon and spare ammunition in the form of clips for a .45 caliber semi-automatic weapon and, finally, a loaded .45 caliber semi-automatic pistol which was fully operable (T. 33-37).

After appellant was transported to the Eighth Precinct in Nassau County, the rear seat of the police cruiser in which he was riding was searched and an additional firearm was found (T. 50-52).

Mr. Lawrence Myerson testified that he was appellant's probation officer and that he was assigned to appellant's case on April 2, 1973 (T. 10). Prior to that time appellant had been formally advised of all conditions of his probation and acknowledged them (T. 7-10).

Condition One of the probation provided that the probationer ". . . shall refrain from violation of any law, Federal, State and Local, [and that he should] get in touch immediately with [his] probation officer if arrested or questioned by a law enforcement officer" (T. 10). Myerson testified that on April 24, 1973 appellant was arrested and

charged with possession of dangerous weapons, leaving the scene of an accident and reckless endangerment (T. 11). On September 20, 1973 appellant was found guilty of the felony of reckless endangerment following this arrest (T. 14).

Condition Two, it was shown, required appellant to ". . . notify [his] probation officer immediately of any change in [his] place of residence" (T. 15). Mr. Myerson testified that from the time appellant was assigned to him in April, 1973, he had not heard from him until February 7, 1974, when he responded to a letter (T. 16-18). It was Myerson's testimony that, though appellant had been hospitalized for part of that time, he had been discharged on January 8, 1974 (T. 18). Myerson unequivocally stated that from April, 1973 to October 1973, appellant never reported to his probation officer, even though he was instructed to do so originally (T. 20-22).

Appellant's brief testimony at the hearing consisted solely of a summary denial of all allegations (T. 64-67).

(3)

After both sides rested, the Court found appellant to be in violation of the terms of his probation, specifically finding as follows:

> "On the basis of the evidence adduced at the hearing, it is my considered opinion, and I accordingly find the Government has sustained its burden of proving that Mr. Phillips, the petitioner herein, violated each of the three general conditions of his probation, as well as the far more importan[t] and serious special conditions; that he refrain from possessing or controlling guns.
>
> Because of the seriousness of the violation of the special condition—I should say particularly because of that—I have no alternative but to revoke his probation" (T. 69).

The Court then ordered appellant committed, pursuant to 18 U.S.C., § 4208(b) for study and report prior to the imposition of final sentence. Following that report, appellant was finally sentenced as noted, *supra* at 1.

ARGUMENT

The District Court properly found appellant to have violated the special condition of probation.

Appellant contends that this matter should be remanded to the District Court for a rehearing or, in the alternative, for resentencing. Although appellant does not contest the District Court's findings or the evidence respecting the three violations of the standing order of probation, he does argue that the District Court's finding with respect to the special condition of probation was erroneous.* Initially, he argues that the evidence at the hearing was insufficient ("not a scintilla of evidence" [Brief, p. 8]) to connect him with the gun found in the back seat of the patrol car in which he was transported following his arrest. As to the disassembled weapon found in his attache case, he contends that there was no evidence to show that the device "was in fact a firearm at all" (Brief, p. 9), within the supposedly applicable definition of "firearm" as found in Title 18, U.S.C., Section 921(a)(3).

Appellant's overall contention is without merit. In short, he has overlooked the fact that, in addition to the

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* The United States concedes that a resentencing would be appropriate in this case if this Court should find that Judge Rayfiel abused his discretion with respect to his finding that appellant violated the special condition of probation. While the record clearly supports findings that appellant violated the three standard conditions of probation, as charged, it is not clear that Judge Rayfiel would have sent appellant to prison without his additional finding regarding the special condition.

so-called disassembled weapon found in the attache case and the gun found in the patrol car, there was also found a fully assembled and operable gun in the attache case (T. 36-37). Quite clearly, the presence of a gun in his attache case, constituted, in the language of the special condition, "contact with guns." In all events, the arguments appellant has advanced are without merit.

The standard by which a district judge is bound in determining whether or not a probationer is a violator, is without ambiguity. It is well settled that he need not be convinced "beyond a reasonable doubt" by the evidence, or even by a "preponderance", in order to find a violation of probation. The test is only that the court be satisfied, from the evidence, that there is reason to believe and credit the allegation of violation. *Burns* v. *United States*, 287 U.S. 216, 223 (1932). It need only be shown that there was a logical basis in fact upon which a determination of violation could be founded. Cf. *United States* v. *Manfredonia*, 341 F. Supp. 790, 795 (S.D.N.Y.), *aff'd*, 459 F.2d 1392 (2d Cir.); *cert. denied*, 409 U.S. 851 (1972). Accordingly, this Court has repeatedly stated that it will not tamper with the holding of a district judge unless the judge has abused his broad discretion. *United States* v. *Nagelberg*, 413 F.2d 708, 709-10 (2d Cir. 1969); *United States* v. *Markovich*, 348 F.2d 238, 240-1 (2d Cir. 1965).

Applying the foregoing standard, it is clear that Judge Rayfiel, to the extent that he relied upon the gun which was found in the patrol car, could properly have concluded that the gun belonged to appellant. Patrolman Esposito testified that after appellant was arrested he was transported to the precinct house in a police cruiser. Upon the car's arrival at the station house the appellant was removed from the rear seat. The seat was then removed and another gun, a .38 caliber revolver was found (T. 50-52). In light of all the other evidence before the court and the

judge's knowledge of the appellant's case it was not unreasonable for the Court to find that this gun was also in appellant's possession until he abandoned it.

It is equally certain that Judge Rayfiel could properly have considered, if he did at all, the disassembled weapon or frame found in the attache case as a violation of the special condition. Judge Rayfiel, of course, did not even use the word "firearms" in the judgment of probation. Rather he ordered that appellant ". . . refrain from having *any* contact with *guns*" (emphasis added).* Obviously, it was the Court's intention that appellant be totally disassociated from guns of any sort, in any form. This interpretation is reasonable from a common sense approach, as well as when considered in light of the Judge's comments at the sentencing regarding appellant's psychiatric difficulties (Transcript of Sentencing, p. 12). Had Judge Rayfiel desired to limit the special condition of probation to the relatively narrow definition cited by appellant, it would have been a simple matter for him to do so. In any event, even under the definition upon which appellant relies the very objects found in his attache case, apart from the gun, do satisfy the definition by being "frames" of weapons. Title 18, U.S.C., § 921(a)(3)(B).

In sum, appellant's entire argument depends on the assertion that Judge Rayfiel erroneously interpreted a specific condition of probation that he authored and imposed. In order for appellant to prevail (and for the matter to be remanded) this Court would have to engage in the most strenuous of semantical gymnastics, stretching common sense far beyond the breaking point in order to rule that the evidence adduced at the hearing did not

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* It is noteworthy that appellant is apparently operating under the misconception that Judge Travia imposed the conditions of probation (Appellant's Brief, at 2) when in fact it was Judge Rayfiel. (See Appellant's Appendix, docket sheet, p. 1).

clearly illustrate exactly the set of circumstances which Judge Rayfiel sought to avoid with the special condition he required. We respectfully submit that appellant was properly found in violation of the special condition of probation.

CONCLUSION

The revocation of probation by the District Court should be affirmed.

February 3, 1975

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
ETHAN LEVIN-EPSTEIN,
Assistant United States Attorneys,
Of Counsel.

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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 3rd day of February 1975 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Gustave Weiss, Esq.
1540 Broadway
New York, N. Y. 10036

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, Washington Street, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
3rd day of February 19 75

Notary Public
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1976